

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-2064

TO BE ARGUED BY:
NORMAN S. HATT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, ex rel :
JOSEPH A. MERCOGLIANO :

Petitioner-Appellant :

-against- :

COUNTY COURT OF NASSAU COUNTY :

Respondent-Appellee :

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DOCKET NO. 76-2064

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

JAMES J. McDONOUGH
Attorney for Petitioner-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN
NORMAN S. HATT

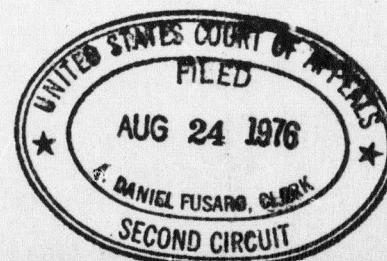


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On Appeal from the United States District Court

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BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on June 7, 1976 by the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York. The order and opinion are unreported and are reproduced at pages A-1 through A-11 of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney-in-Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

OPINION AND ORDER BELOW

On June 7, 1976 the United States District Court for the Eastern District of New York (Platt, U.S.D.J.) filed an opinion and order dismissing the petition (see pp. A-1 to A-11 of the appendix for complete copy of the court's decision). The court held that the New York second felony offender law (Penal Law Sec. 70.06) did not violate the guarantee of equal protection of the laws as it applied to the petitioner, despite the fact that the petitioner's prior felony conviction in Texas would not have been deemed a felony had the offense been committed in New York, since in the court's view it was rational for the legislature of New York to conclude that violation of any state's felony statute, no matter what the proscribed act should be, was a sufficient reason to apply the harsher penal sanctions of the second felony statute if the offender thereafter committed a felony in New York.

THE ISSUE PRESENTED

1. Did the New York second felony offender statute (Penal Law §70.06), imposing harsher penal sanctions upon conviction of a second felony, violate the guarantee of equal protection of the laws insofar as it included in the definition of predicate felony those offenses which, if committed in certain foreign jurisdictions are deemed prior felonies but which if committed in New York are not deemed prior felonies?

STATEMENT OF THE CASE

On January 21, 1975, the petitioner entered a guilty plea in the County Court of Nassau County (Alfred F. Samenga, J.) to a charge of attempted criminal sale of a controlled substance in the sixth degree, a class E felony. He was sentenced on April 4, 1975 as a second felony offender pursuant to Sec. 70.06 of the Penal Law to an indeterminate prison term of 1 1/2 to 3 years. On May 8, 1975 the Supreme Court of Nassau County (Theodore Velzor, J.) ordered that the execution of the petitioner's judgment of conviction be stayed pending appeal, and that the petitioner be released on bail.

The petitioner contends that Sec. 70.06 of the New York Penal Law, pursuant to which his sentence was imposed, was unconstitutional as it applied to him as a violation of the Fourteenth Amendment's guarantee of equal protection of the laws. He raised this claim in the state courts of New York and has exhausted all state remedies. His judgment of conviction was affirmed by the Appellate Division of the Supreme Court for the Second Judicial Department on January 6, 1976. People v. Mercogliano, 50 A.D.2d 907 (1976). Leave to appeal to the New York State Court of Appeals was denied on February 4, 1976. People v. Mercogliano, 38 N.Y.2d

946 (1976). The petitioner has no further review of the claim raised herein available in the courts of New York State.

On February 25, 1976 the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. By an order dated June 7, 1976 the petition was denied (Platt, U.S.D.J.). A certificate of probable cause was issued by the Eastern District Court on June 16, 1976. A notice of appeal was served on June 23, 1976.

STATEMENT OF FACTS

When he appeared for sentencing in the County Court of Nassau County, the petitioner admitted that he had been convicted in Texas in 1972 of a charge of possession of marijuana (minutes of sentencing, appendix, p.A-32). Defense counsel then informed the court that the petitioner's 1972 Texas conviction was for possession of two marijuana cigarettes. While this offense constituted a felony in Texas in 1972 and could have subjected him to imprisonment for not less than two years in Texas, counsel for the petitioner stated that the same offense, had it been committed in New York, both in 1972 and at the time of sentence, would have constituted only a misdemeanor (minutes of sentence, appendix, p. A-33). Nevertheless,

the court felt constrained to sentence the petitioner as a second felony offender on the basis of the 1972 Texas conviction, pursuant to Penal Law Sec. 70.06, and imposed an indeterminate term of imprisonment of 1 1/2 to 3 years, the minimum period allowed by Penal Law Sec. 70.06.

POINT ONE

NEW YORK'S SECOND FELONY OFFENDER STATUTE
WAS UNCONSTITUTIONAL AS APPLIED TO PRIOR
OUT-OF-STATE FELONY CONVICTIONS FOR OFFENSES
THAT WOULD NOT ALSO BE FELONIES IN NEW YORK

At the time of the petitioner's sentence Sec. 70.06 of the New York Penal Law mandated minimum and maximum prison sentences for defendants convicted of felonies who had previously been convicted within the past ten years of a felony in New York or a conviction "in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized" [P.L. §70.06(1)(b)(i)].¹ Pursuant to this statute, one who had previously been convicted of an out-of-state "felony" would be subject to second felony offender treatment in New York whether or not the predicate out-of-state offense would have been a felony had it been committed in New York State. The petitioner's case is a good illustration of the reach of the New York second felony statute. His sole prior felony conviction was a 1972 Texas conviction for possession of two

¹Effective August 9, 1975, P.L. §70.06 was amended to limit out-of-state convictions for predicate felony purposes only to "an offense for which a term of imprisonment in excess of one year was authorized and could be authorized in this state." L.1975, c. 784. (The underlined matter is new). As can be seen from the memorandum of the amendment's sponsor in the New York State Assembly, (see appendix, p. A-36) the legislature's purpose was to correct what it perceived to be a constitutional infirmity in the existing second felony offender statute.

marijuana cigarettes (minutes of sentence, appendix, p.A-33).²

In both 1972 and at the time of sentence New York law treated the possession of this amount of marijuana as only a misdemeanor. (See Penal Law Sec. 220.03, formerly Penal Law Sec. 220.05.)

Once the petitioner had been classified as a second felony offender within the meaning of Penal Law Sec. 70.06(1), the trial court was required to impose an indeterminate prison sentence with a minimum term ranging from 1 1/2 to 2 years, and a maximum term ranging from 3 to 4 years. The court imposed the shortest possible sentence within this range (1 1/2 to 3 years). However, had the petitioner's marijuana conviction occurred in New York or most other states, he would have had no predicate felony conviction and would have been sentenced as a first felony offender and been eligible for lesser prison terms (see Penal Law Sec. 70.00, Sec. 85.00) or a term of probation (see Penal Law Sec. 65.00). It is apparent, therefore, that the petitioner was treated more harshly, by being denied eligibility for lesser sentences, solely because he committed his prior offense in Texas instead of New York State. Such harsher treatment

²Effective August 27, 1973, the crime in Texas of possession of marijuana in an amount not exceeding two ounces became classified as a class B misdemeanor (Vernon's Annotated Revised Civil Statutes of Texas, Art. 4476-15, Section 4.05). The repealed Texas statute, under which the defendant was convicted, classified the possession of any amount of marijuana as a felony punishable by imprisonment of not less than two years nor more than life (Vernon's Annotated Penal Code, Article 725d, Section 23).

of one's personal liberty, of which a defendant will be deprived if found to be a second felony offender, more than the merest rationality must be shown to sustain the statute. Cf. People ex rel Charles L. v. Schupf, N.Y.2 N.Y.L.J., June 8, 1976, p. 1, col 6; Bolling v. Mason, 345 F. Supp. 48 (D. Conn., 1972).

While the petitioner recognizes that in Marshall v. United States, 414 U.S. 417 (1974), the Supreme Court did not find that strict scrutiny was required to evaluate a federal statute somewhat similar to the New York second felony statute, it is submitted that a more substantial degree of rationality should be required of a statute which increases one's term in prison than, for example, should be required of a statute that regulates licensing of opticians, as in Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 173 (1972) the Court indicated that a balancing of interests is appropriate when it stated, "The essential inquiry...is...inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Some courts have interpreted the Weber decision as marking at least a partial departure from the traditional two-tier framework of equal protection analysis, Matter of Malpica-Orsini,

was a violation of his right to equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.³ People v. Mazzie, 78 Misc.2d 1014 (Sup. Ct. N.Y. Co. 1974); People v. Morton, 48 A.D.2d 58 (3rd Dept. 1975); United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); cf. Skinner v. Oklahoma, 316 U.S. 535 (1942); but see, contra, People v. Wixon, 79 Misc.2d 557 (Sup. Ct. Westchester Co. 1974); People v. Darson, 48 A.D. 2d 931 (2nd Dept. 1975).

The test for determining whether a statute violates the Equal Protection Clause of the Fourteenth Amendment is whether the classification is reasonable, not arbitrary, and whether it rests upon some ground of difference having "a fair and substantial relation to the object of the legislation." Reed v. Reed, 404 U.S. 71, 76; Royster Guano Co. v. Virginia, 253 U.S. 412, 415. The question presented in the instant case is whether a difference in the degree or quality of punishment based upon the state in which a crime was committed bears a rational relationship to the legislative objective of Penal Law Sec. 70.06. The petitioner urges that in view of the great importance

³The petitioner, however, does not challenge the New York second felony statute per se. He challenges it only insofar as it treated him more harshly than other offenders with identical predicate convictions in New York. The courts have long upheld the validity of a properly drafted recidivist statute against attacks on the grounds of equal protection. See Spencer v. Texas, 385 U.S. 554; Oyler v. Boles, 368 U.S. 448.

36 N.Y.2d 568, 574-575 (1975), and have noted increasing dissatisfaction with that approach, Montgomery v. Daniels, 38 N.Y.2d 41, 61 (1975); Matter of Malpica-Orsini, supra, at 582 (dissenting opinion of Jones, J.); see San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 70-135 (dissenting opinion of Mr. Justice Marshall). Under such a "sliding-scale" standard, requiring at least a substantial state interest, the challenged classification of the New York second felony statute must fall. Even under the "rational basis" test, however, the petitioner submits that differentiation in sentencing treatment based upon the location of a prior offense does not bear "a fair and substantial relation to the object of the legislation."

The legislative purpose of the New York second felony statute is three-fold: to provide increased deterrent for those who have shown a propensity for felonious conduct by the commission of previous serious offenses, to punish more severely those criminals who persist in the commission of felonies, and to isolate such persons for the protection of society. People v. Butler, 46 A.D.2d 422 (4th Dept. 1975); People v. Gennaro, 261 App. Div. 533, 537 (1st Dept. 1941); People v. Bergman, 176 App. Div. 318 (2nd Dept. 1916). Thus the purposes of the New York second felony offender statute are to deter, punish

and isolate those whom New York deems to be hardened criminals.

These purposes are in no way advanced by making the place of commission of a previous offense a distinguishing factor. One does not become a more or less hardened criminal by virtue of the fact that his previous offense was committed in another state, nor does that factor suggest a need for increased deterrence or increased isolation for such an offender. To hold otherwise is to encompass within the New York definition of "hardened criminal" offenders whose previous offense is not regarded as particularly serious, and perhaps no crime at all, in New York. For example, one who has been previously convicted of

fornication in Alabama (Ala. Code, tit. 14, §16), seduction in Texas (Vernon's Ann. Tex. Penal Code, tit. 10, Art. 505), blasphemy in New Jersey (N.J.S.A. 2A : 140-2), vagrancy in Rhode Island (R.I. Gen.L. §11-45-1), or of stealing a library book in North Carolina (N.C. Gen. Stats. §14-398) or a turkey in Arkansas (Ark. Stats. §41-3916.1) must be treated as a second felony offender in New York and given mandatory minimum sentences. People v. Mazzie, 78 Misc.2d 1014, 1018 (Sup. Ct. N.Y. Co. 1974).

Increased punishment for those previously convicted of such "crimes" or, as in the petitioner's case, possession of two marijuana cigarettes, bears no rational relationship to the statutory purpose of increased punishment for hardened criminals.

In United States v. Bishop, supra, the First Circuit reviewed the federal statute which barred addicts with two prior felony convictions from rehabilitative treatment in lieu of imprisonment [18 U.S.C. 4251(f)(4)]. The court held that this statute presented an "egregious anomaly" as it provided for different punishment for defendants previously convicted of identical acts depending on whether the law of the place where the acts were committed classified them as felonies:

Thus two persons who both had twice previously committed the identical crime of possession of marijuana might be treated differently under §4251(f)(4) simply because one committed his crimes in Florida where possession of over five grams is a felony and the other committed his in New York where it is only a misdemeanor ... or because one committed both of his crimes before May 1, 1971 and the other committed them after that date, when the federal offense of marijuana possession was reduced to a misdemeanor for first offenders.

Surely one cannot claim that committing a crime in Florida, or in one year rather than another, or foregoing one document rather than another makes one a more hardened criminal. 469 F.2d at 1345 [emphasis added].

Both the court below and the petitioner take the position that Bishop was in effect overruled by Marshall v. United States, 414 U.S. 417 (1974). It is submitted that this is an inappropriate reading of Marshall since the majority opinion dealt with an equal protection argument wholly distinct from the issue raised in Bishop and in the

instant case. In Marshall the defendant attacked Tit. II of the Narcotic Addict Rehabilitation Act (NARA) on the ground it excluded from consideration for rehabilitative treatment (instead of incarceration) all those convicts who had two or more previous felony convictions in any jurisdiction. Sec. 18 U.S.C. §1451(d), (f). The Court held that the two-felony exclusion rule of the NARA did not violate equal protection because there was a rational relation between the rule and the purposes intended by Congress. It found that Congress had reasonably concluded that the rule would limit rehabilitative treatment to those for whom such treatment was most likely to succeed and who would pose the least threat to society if not incarcerated.

The majority opinion did not discuss the problem at bar--whether defining as prior felonies those convictions which are denominated felonies in one state but classified as lesser offenses in another violates equal protection. The sole issue which the majority decided was whether two felonies in general was a valid criteria with which to exclude one group of defendants from consideration for rehabilitative treatment. The dissent concluded that there was not a rational basis for the two felony rule and, inter alia, in a footnote quoted the First Circuit's holding in United States v. Bishop, quoted above, that the two-felony rule produced the "egregious anomaly" of

including as prior felonies those offenses which would not be felonies if committed in certain states. See Marshall v. United States, supra, at 431, n. 1.

The respondent and the court below have taken the position that "it is rational to measure conduct with a yearstick supplied by the society in which the conduct occurs." (Opinion below, Appendix, p. A-6). In their view, a non felonious act in New York may properly be considered more serious and therefore a sufficient basis for second felony treatment because that act was committed in a jurisdiction which does view the act as a felony. It is not the intrinsic nature of the previous act itself but the "violation of an important prevailing norm in another jurisdiction that identifies the serious criminal offender and calls for an extended term...." (respondent's affirmation in the court below, p. 8). In their judgment, the petitioner "has in effect demonstrated that he is not concerned about having in accordance with the norms important to the society in which he is present, and that factor sets him apart from the possessor of marijuana in New York who has demonstrated no comparable lack of concern." (opinion of the court below, appendix, p. A-5)

The petitioner submits that this argument fails to provide a rational basis because New York has no rational interest in enforcing the prevailing norms and laws of

another jurisdiction by giving those norms and laws second felony effect for the purposes of New York sentencing. A prior offender with a conviction from another jurisdiction has already been punished by the jurisdiction where the prior offense was committed. Hence, that jurisdiction's norms have already been satisfied. The interests to be served by the New York second felony statute are solely those of New York. Whether a prior offender would be considered a "serious criminal offender" by another jurisdiction is of no rational concern to New York courts when imposing sentences for offenses committed in New York. New York's only legitimate concern is whether a defendant is a sufficiently "serious criminal offender" within the standards of New York to merit a harsher sentence as a second felony offender in this state.

Decisions by the New York courts concerning the consequences in New York of foreign convictions in various other contexts indicate that it is the seriousness of the prior offense by New York's standards that rationally matters to New York, and that the effort to make this determination is not overly burdensome. In Matter of Donegan, 282 N.Y. 285 (1940), the New York State Court of Appeals discussed the interests of New York State where automatic disbarment proceedings are based upon out-of-state felony convictions. It noted that "the classifi-

cation of crimes into felonies and misdemeanors represents the view which the given jurisdiction takes of the gravity of the offense." Id. at 290. Interpreting former section 88 (subd. 3) of the Judiciary Law [presently §90 (subd. 4)], which mandates disbarment of any attorney convicted of a "felony" to include only those offenses which would constitute felonies in New York, the court stated,

[o]therwise, there would be the anomalous result whereby the statute would require the Appellate Division summarily to disbar for life without the possibility of modification for an offense which is a felony under the laws of the United States but which, if punished by the laws of this State, would permit of a hearing and less severe results. Id. at 291.

Accord, Matter of Levy, 37 N.Y.2d 279 (1975) [disbarment]. The conclusion that New York State should not give extra-territorial effect to another jurisdiction's definition of felony has been followed in several other areas by the New York Courts: Matter of Cohen, 278 N.Y. 584 (1938) [disqualification of a fiduciary]; People ex rel Atkins v. Jennings, 248 N.Y. 46, 52 (1928) [violation of the conditions of a commutation of sentence]; Sims v. Sims, 75 N.Y. 466, 469 (1878) [testimonial competence]; 1965 Att'y Gen. Opin. 48 [disqualifications under Real Property Law §440-a and Executive Law §130 for convictions in other jurisdictions].

Perhaps the most persuasive evidence that New York has no rational interest to define who is a hardened criminal in terms of another jurisdiction's statutes is found in the fact that the New York State legislature, as soon as it realized that the second felony statute might result in violations of equal protection, amended the statute so that a predicate conviction from another jurisdiction must also have been a felony in New York. [See the attached Memorandum in Support of the amendment, submitted by the amendment's sponsor in the New York State Assembly, Arthur Eve, appendix p. A-36.] The law was amended at a time when the New York courts were in conflict over whether the then existing law was a violation of equal protection and the state's highest court had not yet considered the matter. Compare People v. Mазzie, 78 Misc.2d 1014 (Sup. Ct. N.Y. Co. 1974) and People v. Morton, 48 A.D.2d 58 (3rd Dept. 1975), with People v. Wixon, 79 Misc.2d 557 (Sup. Ct. Westchester Co. 1974), and People v. Darson, 48 A.D.2d 931 (2nd Dept. 1975). Had the legislature felt that the state had any rational interest to be served by including previous convictions which would not be felonies in New York within the definition of predicate felony, it would not have been so quick to amend the law. Indeed, in the opinion of one commentator, the amendment to the statute represented a legislative

recognition that the statute before amendment was neither "fair nor logical." Hechtman, Supplementary Practice Commentary, McKinney's Cons. Laws of New York, Book 39, Penal Law Sec. 70.06, Pocket Part (1975-1976), p. 16.

The court below cites Miller v. California, 413 U.S. 15; Hamling v. United States, 418 U.S. 87; and Brea-Garcia v. United States Immigration and Naturalization Service, ___ F.2d ___, 44 U.S.L.W. 2414 (3rd Cir. Feb. 25, 1976), for the proposition that "deference may be paid to the standards of the community in which questionable activity takes place." (opinion below, appendix, p. A-6). The petitioner naturally agrees that different jurisdictions may properly establish and enforce differing codes of conduct, and each jurisdiction may punish transgressions of those codes accordingly. But no jurisdiction has a rational interest in enforcing and penalizing violations of other jurisdiction's standards. Indeed Miller and Hamling stand for the proposition that one community cannot employ another community's standards to decide whether given material is obscene. In Brea-Garcia, a naturalization case, reference was made to a particular state's definition of adultery by necessity, since Congress has promulgated no definition of that act.

It should also be noted that the two other federal circuit courts that have discussed the problem of defining adultery for the purposes of a deportation proceeding have concluded that it would be unfair and contrary to the congressional intent to adopt the state definition where the act was committed. Moon Ho Kim v. United States Immigration and Naturalization Service, 514 F.2d 179 (D.C. Cir. 1975); Wadman v. United States Immigration and Naturalization Service, 329 F.2d 812 (9th Cir. 1964). It should also be noted that an equal protection claim was neither raised nor discussed in any of these cases.

The respondent has argued below that there is a rational basis for the classification made by the New York second felony statute, because a standard which required that a prior offense must also have been a felony in New York would be "burdensome and time consuming to apply." Such a rule would involve "administrative and judicial pitfalls" in the respondent's view. While there may be some additional effort required for prosecutors and courts to apply this standard, this is hardly a sufficient burden rationally to justify imposing substantial additional periods of incarceration upon a defendant. Indeed, the legislature by amending the law to require application of just this standard (L. 1975, c 784) has concluded that the standard will not impose

an unreasonable burden upon the resources of this state. Smith v. Follette, 445 F.2d 955 (2nd Cir., 1971), cited by the respondent in support of his claim that "administrative and judicial necessity" was the rational basis for the second felony law before its amendment, is inappropriate. The court held in Smith that when financial resources to support narcotic rehabilitation programs are scarce, the state may rationally allocate those resources to those addicts most likely to benefit from these services without having to provide these programs to all addicts. The instant case, unlike Smith, does not involve allocation of scarce resources. Indeed to require that predicate felony convictions from other jurisdictions also be felonies in New York would reduce state expenditures since defendants such as the petitioner would not be subject to such lengthy incarceration at state expense.

The respondent has also argued below that a decision that the New York second felony law, prior to its amendment, was unconstitutional as it affected the petitioner would necessarily mean a conclusion that the federal equivalent of the New York second felony statute, 18 U.S.C. §3575, was similarly unconstitutional.⁴ However,

⁴There appear to have been no cases which have discussed a comparable equal protection challenge to the federal recidivist statute.

the federal statute is substantially differently from its New York counterpart because the federal law imposes no mandatory sentences. It merely provides guidelines by which the court, in its discretion, may impose a sentence longer than would otherwise be allowed, if the court finds that a longer period of confinement is necessary to protect the public from the defendant [§3575(d)] and such longer term would be "appropriate" [§3575(b)]. Clearly, if the court were informed that a prior felony conviction in a particular state was not regarded as a felony in other states, it could conclude that an increased sentence was not "appropriate" and thereby avoid the equal protection problem found in the case at bar.

The respondent has contended that the New York second felony statute did not violate equal protection because it provided a "uniform" standard by means of its definition of a predicate felony as a prior conviction for which a sentence to a term of more than one year could be imposed. Penal Law Sec. 10.00(5). While this standard is uniform on its face, it is not uniform in application. Just as what conduct may be classified as a "felony" varies widely from jurisdiction to jurisdiction, so also does the enumeration of conduct which merits imposition of a sentence in excess of one

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year. As properly noted by the court below (opinion below, appendix, p.A-5), to sustain the statute, the respondent must still demonstrate that it is rational to make the length of sentence where the offense took place to be the controlling factor, rather than the length of sentence which would be applied in New York. It is submitted that a sufficient demonstration of the rationality of this classification has not been made.

In summary, New York State has no rational or legitimate interest to be served by treating more harshly an offender whose prior offense was committed in a foreign state than it treats other offenders who have committed the identical offenses in New York. The New York second felony law, as it existed prior to amendment, was therefore unconstitutional.

POINT TWO

THE PETITIONER HAS EXHAUSTED ALL STATE REMEDIES

The respondent has argued below that "there may be a jurisdictional impediment" to the instant petition for a writ of habeas corpus, because in his view the petitioner has not exhausted all state remedies. He basis this claim upon the fact that when Judge Fuchsberg denied the petitioner's application for leave to appeal to the New York State Court of Appeals, he included in the certificate denying leave the phrase "with, leave to review in view of the pendency of People v. Mary Ann Parker." (See appendix p. A-37). Parker is a case now pending in the New York State Court of Appeals in which the defendant-respondent therein challenges the constitutionality of the New York second felony statute (Penal Law Sec. 70.06).

The peculiar wording of Judge Fuchsberg's certificate denying leave to appeal in no way created a "remedy" which can deny the petitioner the right to seek habeas relief in the federal courts. First, the petitioner is not a party to the Parker case; it is a wholly separate case. Second, the defendant in Parker has no standing to raise the equal protection argument made in the instant petition, because he admits that his predicate felony conviction would have been a felony in New York,

whereas the petitioner's predicate conviction would not be a felony in New York. Parker's attack on the second felony statute is based on the New York State constitutional provisions against delegation of legislative responsibility and incorporation of by reference of other statutes. See People v. Parker, 49 A.D.2d 657 (3rd Dept. 1975).

Third, it is uncertain whether Judge Fuchsberg had jurisdiction to deny leave to appeal but at the same time offer an opportunity to "review" the denial of leave at some later date. The respondent has cited no authority permitting a judge of the New York Court of Appeals to make a conditional denial of leave to appeal. Fourth, and most important, Parker has not yet been decided by the Court of Appeals. Both at the time the instant habeas petition was filed, and at the present time, the petitioner may not renew his application for leave to appeal to the New York Court of Appeals. Whatever state remedy the petitioner possesses now is entirely hypothetical and cannot be exercised, if at all, until some uncertain time in the future.

CONCLUSION

FOR THE ABOVE STATED REASONS THIS COURT
SHOULD REVERSE THE ORDER OF THE DISTRICT
COURT DISMISSING THE PETITION FOR A WRIT
OF HABEAS CORPUS.

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN
NORMAN S. HATT